

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JULIE NONEMACHER and
THOMAS H. NONEMACHER,

ORDER

Plaintiffs,

11-cv-632-slc

v.

RAIN & HAIL, LLC,

Defendant.

This is a civil diversity action on removal from state court in which plaintiffs Julie and Thomas Nonemacher allege that defendant Rain & Hail, LLC exercised bad faith in denying their insurance claim for losses sustained as a result of their inability to plant crops due to adverse weather. In an order entered on April 23, 2012, I construed Rain & Hail's motion to confirm the parties' arbitration award as a motion for summary judgment, found that the Federal Arbitration Act (FAA) applied, and confirmed the arbitration award pursuant to 9 U.S.C. § 9. Dkt. 7. Because the parties had agreed that the motion addressed dispositive issues in the case but had not addressed whether, and to what extent, the findings of the arbitrator have preclusive effect over plaintiffs' state law claim, I asked the parties for further input. The court set deadlines for each side's submission.

Rain & Hail responded with supplemental briefing, arguing that the Federal Crop Insurance Act (FCIA) preempts state law and bars the Nonemachers' claim unless they first satisfy the condition precedent of seeking a favorable determination from the FCIC, which they

failed to do.¹ Dkt. 18. In the alternative, Rain & Hail argues that the arbitrator's findings are entitled to deference and have preclusive effect.

The Nonemachers failed to respond.

By failing to respond to Rain & Hail's legal arguments, the Nonemachers have waived any arguments in opposition and have failed to meet their burden at summary judgment of showing that their state law claim survives. *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 926 (7th Cir. 2007) ("A failure to oppose an argument permits an inference of acquiescence and 'acquiescence operates as a waiver.'") (quoting *Cincinnati Insurance Co. v. East Atlantic Insurance Co.*, 260 F.3d 742, 747 (7th Cir. 2001)).² The Nonemachers' failure to respond is equivalent to them conceding that their state law claim fails. Approached from a different angle, Rain & Hail's supplemental arguments establish that they are entitled to judgment as a matter of law on these facts, and there are no counter-arguments that indicate otherwise. *Cf. Raymond v. Ameritech Corp.*, 442 F.3d 600, 608 (7th Cir. 2006). As a result, I will grant Rain & Hail's motion for summary judgment and dismiss this case.

¹ In the April 23, 2012 order, I relied on various federal court decisions to conclude that neither the FAA nor the FCIA preempts a state law tort claim against the insurance company. *See* dkt. 17 at 8. This conclusion was premature because neither party had briefed that issue directly, but instead had focused on whether the arbitration decision was binding. Rain & Hail now takes the position that the FCIA preempts state tort claims, arguing that the FCIC issued regulations in 2004 to clarify the preemptive power of the FCIA. A cursory review of Rain & Hail's arguments indicates that it may be correct. *See* 7 C.F.R. § 400.352 (state government may not levy damages against companies authorized under FCIA unless determination first obtained from FCIC that company failed to comply with policy or FCIC procedures). However, I will not undertake this analysis because it has not been briefed by the Nonemachers and will not have any bearing on the outcome of this case.

² Although *Wojtas* and *Cincinnati Insurance* involve dismissal motions, waiver also applies in the summary judgment context, *see, e.g., Marcavage v. City of Chicago*, 659 F.3d 626, 638 (7th Cir. 2011)(Hamilton, J., dissenting in part); *Marshall v. Local 701, Int'l. Bro. of Electr. Workers*, 387 Fed. Appx. 623, 2010 WL 2853348 (7th Cir. 2010) (unpublished).

ORDER

IT IS ORDERED that defendant Rain & Hail, LLC's motion for summary judgment (dkt. 7) is GRANTED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Entered this 11th day of July, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge